BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY W. WILBURN	)	
Claimant	)	
	)	
VS.	)	
	)	
BRADKEN	)	
AMERICAST TECHNOLOGIES	)	
Respondents	)	Docket No. **1,055,701**
	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO. OF AMER.	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carriers	)	

ORDER

Americast Techologies (Americast) and its insurance carrier, Commerce & Industry Insurance Co. (Commerce) request review of the December 29, 2011 Preliminary Decision entered by Administrative Law Judge Marcia L. Yates.

ISSUES

The claimant was provided hearing aids for a work-related hearing loss in 2006. The audiologist who prescribed the hearing aids continued to provide claimant annual checkups. After additional hearing testing provided by respondent in 2010 claimant was told his hearing had worsened so he returned to the audiologist who prescribed new hearing aids. Commerce, respondent Americast's insurance carrier at the time when the initial hearing aids were provided, denied liability and asserted claimant had suffered a new injury or aggravation of his hearing condition.[1] In the alternative, Commerce further argued claimant had failed to file a timely application for hearing pursuant to K.S.A. 44-534.

Respondent Bradken and Travelers Indemnity Company of America (Travelers) argued claimant's date of accident was either July or September 2006 and Commerce was the carrier for those dates of accident. Travelers further argued claimant had never been

[1] Claimant testified he has worked at the same facility for the same employer throughout the time periods involved in this claim. Initially, respondent was named Americast and later became Bradken. The record does not disclose whether this was a corporate name change or two different corporate entities.

disabused of his right to medical treatment which he continued to receive on at least an annual basis, consequently his application for hearing was timely.

The Administrative Law Judge (ALJ) determined claimant received ongoing medical treatment for his hearing from respondent after 2006 and was never disabused that such treatment would no longer be provided. Consequently, the ALJ determined claimant's application for hearing, filed within two months after claimant was finally told further treatment would not be provided, was timely.

Commerce requests review of whether the ALJ erred in the determination of the date of accident and further argues claimant suffered a subsequent aggravation to his hearing condition. Commerce also argues that the ALJ exceeded her jurisdiction by awarding additional compensation after the statute of limitations for filing an application for hearing had expired.

Bradken and Travelers raised the following issues on review:

1) What is the appropriate date of accident due to claimant's repetitive trauma?

2) Would an aggravation of claimant's hearing loss in 2010 change the date of accident pursuant to K.S.A. 44-508(d)?

3) Was claimant's application for hearing timely filed on April 29, 2011?

The pro se claimant argues the ALJ's Preliminary Decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant has worked for respondent as an electrician since January 10, 1967. Respondent provides hearing tests every year for its employees. Based upon the hearing test results in July 2006, claimant was told he needed to see a specialist. Claimant sought medical treatment with Dr. Annette Cook, an audiologist, who then prescribed hearing aids for claimant. Americast and Commerce paid for Dr. Cook and these hearing aids.

Claimant has continued to have office visits with Dr. Cook on an annual basis and sometimes more frequently for cleaning and adjustment of the hearing aids. The follow-up visits were included in the original payment for the hearing aids. Claimant testified that he was told the hearing aids should be updated about every three years.

Claimant testified that between 2006 and December 2011, the loud noise at the job site has remained about the same. After the annual hearing test provided by respondent

in 2010, claimant was again told his hearing had worsened. Claimant returned to Dr. Cook in December 2010 and she advised him that his hearing loss had changed and that he needed his hearing aids updated.

In a letter dated January 4, 2011, Dr. Cook advised a claims adjuster that claimant needed new hearing aids due to a bilateral decrease in hearing sensitivity since the hearing aid fitting in 2006. The claimant was then sent a letter from the claims adjuster, dated April 7, 2011, that his claim could not be re-opened because the statute of limitations had run on his time to file an Application for Hearing.[2] Claimant then filed an Application for Hearing on April 29, 2011, alleging ongoing repetitive hearing loss which had become progressively worse since he was first fitted with hearing aids in 2006.

Commerce had coverage for Americast through December 22, 2008. From December 23, 2010, through December 23, 2011, Travelers had the coverage for Bradken.

The ALJ analyzed the evidence and determined in pertinent part:

> The court finds that claimant is entitled to the relief requested and directs respondent Chantis [sic] to provide the hearing aids as requested by Dr. Cook. Based on the limited evidence presented at preliminary hearing, the court finds that claimant has met his burden of proof that respondent had actual notice of claimant's hearing loss, that timely written claim was made on October 4, 2006 per admission of respondent's representative and that the filing of the Application for Hearing was timely made in accordance with K.S.A. 44-534. Said finding is based on the uncontroverted evidence that claimant was provided with follow up medical treatment with Dr. Cook for maintenance of the hearing aids as well as periodic hearing tests provided by respondent's consultant which constitutes medical treatment as contemplated by the Kansas Workers Compensation Act and occurred within two years of the filing of the Application for Hearing.

Initially, Commerce argues that as claimant continued working after 2006 he suffered a subsequent aggravating injury and the date of accident for the new injury is either in 2010 or 2011. The claimant alleged a series of repetitive injuries. K.S.A. 2006 Supp. 44-508(d) provides:

> 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of**

[2] Claimant's Ex. 1.

> **events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[3] (Emphasis added)

K.S.A. 2006 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that his condition was diagnosed as work related or the date he gave written notice of the injury to the employer. Claimant's uncontroverted testimony was that he provided written notice to respondent in 2006. Although the specific date is not established, Commerce had coverage in 2006 and the date of accident was during that coverage. Arguably, the claimant received written diagnosis of his work-related condition on July 22, 2006, when he was provided the results of the hearing test performed by respondent's consultant. As noted by the ALJ, the April 7, 2011 letter to claimant from the claims adjuster, Patty Lewellen, refers to a written claim dated October 4, 2006. Again, all these dates occurred during Commerce's coverage.

Commerce next argues that the Application for Hearing was not filed until April 29, 2011, and was untimely. K.S.A. 44-534(b) provides:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

The respondent paid for claimant's first set of hearing aids. Claimant continued to return to the audiologist for adjustments and cleaning of the hearing aids on at least an annual basis from 2006 through 2010. The furnishing of medical care by respondent is the

[3] K.S.A. 2009 Supp. 44-508(d).

equivalent of the payment of compensation under the act.[4] Claimant proceeded under the reasonable implication that such medical care was authorized. And respondent never disabused claimant of the reasonable assumption that such additional treatment was authorized.[5] It was only after Dr. Cook suggested that claimant needed new hearing aids that respondent on April 7, 2011, finally told claimant that the hearing aids would not be provided. Claimant then filed his Application for Hearing on April 29, 2011, well within 2 years of the last payment of compensation. This Board Member affirms the ALJ's determination the Application for Hearing was timely filed and the date of accident was within the coverage provided by Commerce.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Marcia L. Yates Roberts dated December 29, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of March, 2012.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Anthony W. Wilburn, Pro Se, 901 Harper Drive, Atchison, KS 66002
Frederick J. Greenbaum, Attorney for Bradken and Travelers
William G. Belden, Attorney for Americast and Commerce
Marcia L. Yates, Administrative Law Judge

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[4] *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App. 2d 383, 642 P.2d 574 (1982).

[5] *Blake v. Hutchinson Mfg. Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

[6] K.S.A. 44-534a.

[7] K.S.A. 2010 Supp. 44-555c(k).